Pembinaan Batu Jaya Sdn Bhd v Pengarah Tanah dan Galian Selangor & Anor

HIGH COURT (SHAH ALAM) — APPLICATION FOR JUDICIAL REVIEW NO 25–126–08 OF 2012
VERNON ONG J
23 MAY 2013

Land Law — Alienation of land — Approval of — Whether state authority had power to revoke approval of alienation of land — Whether state land remained so until registration done and title issued to applicant — Whether doctrine of legitimate expectation could not be used to override express statutory power vested in state authority — Whether state authority not bound to given reasons for revocation of alienation — National Land Code s 78(3)

The State Authority of Selangor had initially approved the applicant's application for alienation of a 70-acre plot of state land to carry out 'mixed development'. The applicant subsequently submitted both to the land office and to the local authority concerned, pre-computation plans for the development but failed to obtain either of their approvals. The applicant however obtained the land administrator's approval to convert the express condition of the land use from 'mixed development' to 'commercial'. Several years thereafter, the applicant was notified by the land office that the state authority had revoked the approval of the alienation ('the decision'). No reason for the revocation was given. In its instant judicial review application, the applicant sought to quash the decision on the ground it was, inter alia, absurd, irrational, unreasonable, took into account irrelevant considerations and that it breached the doctrine of legitimate expectation. The applicant contended that the district officer concerned, in a telephone conversation with the applicant's representative, had informed the latter that the alienation was revoked because of the applicant's failure to pay the land premium.

Held, dismissing the application with costs of RM10,000:

(1) There was no merit in fact or in law to justify the court quashing the decision to cancel the alienation of the state land. The alienation had not been completed as registration pursuant to s 78(3) of the National Land Code had not been effected; no document of title to the land had been issued to the applicant. Therefore, notwithstanding the fact the land had been approved for alienation, it remained state land. In the circumstances, the revocation of the alienation was within the state authority's powers (see para 33).

(2) The legitimate expectation argument was untenable as it had been

pronounced by the Court of Appeal and affirmed by the Federal Court that the doctrine of legitimate expectation cannot and should not override the express statutory power vested in the state authority. Consistent with the prerogative nature of that power, there was no express right to be heard or to be informed of the grounds of revocation (see para 36).

(3) The statement by the applicant's representative that he was informed by the district officer concerned that the revocation was due to non-payment of premium was hearsay and uncorroborated. The district officer was not called to corroborate that assertion and the fact the respondents did not dispute or challenge that assertion by way of affidavit did not change or alter the character of the statement which was sought to be admitted. Hearsay evidence ought to be rejected; it did not become admissible simply because no objection was taken. It was the court's duty to exclude all irrelevant or inadmissible evidence even if no objection was taken as to its admissibility (see para 37).

[Bahasa Malaysia summary

Pihak Berkuasa Kerajaan Negeri Selangor telah pada mulanya meluluskan permohonan pemohon untuk pemindahan 70 ekar bahagian tanah kerajaan untuk menjalankan 'mixed development'. Pemohon kemudiannya menyerahkan kepada kedua-dua pejabat tanah dan kepada pihak berkuasa tempatan yang berkenaan, pelan-pelan pra-pengiraan untuk pembangunan tersebut tetapi gagal untuk mendapatkan kelulusan-kelulusan daripada mereka. Pemohon walau bagaimanapun memperolehi kelulusan pentadbir tanah untuk menukarkan syarat nyata penggunaan tanah tersebut daripada 'mixed development' kepada 'commercial'. Beberapa tahun kemudiannya, pemohon diberitahu oleh pejabat tanah bahawa pihak berkuasa telah membatalkan kelulusan pemindahan tersebut ('keputusan'). Tiada sebab untuk pembatalan diberikan. Dalam pemohonan semakan kehakimannya ini, pemohon memohon untuk mebatalkan keputusan tersebut atas alasan ia adalah, antara lain, mustahil, tidak rasional, tidak munasabah, mengambil kira pertimbangan yang tidak relevan dan bahawa ia memungkiri doktrin harapan yang sah. Pemohon berhujah bahawa pegawai daerah yang berkenaan, dalam percakapan melalui telefon dengan wakil pemohon, telah memberitahu wakil tersebut bahawa pemindahan tersebut dibatalkan kerana kegagalan pemohon untuk membayar premium tanah.

Diputuskan, menolak permohonan dengan kos sebanyak RM10,000:

(1) Tiada merit dari segi fakta atau undang-undang untuk menjustifikasikan mahkamah membatalkan keputusan untuk meluputkan pemindahan tanah kerajaan. Pemindahan tersebut masih belum selesai memandangkan pendaftaraan berikutan s 78(3) Kanun Tanah Negara tidak dikuatkuasakan; tiada dokumen hak milik kepada tanah telah

dikeluarkan kepada pemohon. Oleh itu, tanpa mengambil kira fakta tanah telah diluluskan untuk pemindahan, ia kekal tanah kerajaan. Dalam keadaan ini, pembatalan pemindahan adalah dalam kuasa pihak berkuasa negeri (lihat perenggan 33).

(2) Hujahan harapan yang sah tidak dapat dipertahankan memandangkan ia telah disahkan oleh Mahkamah Rayuan dan disahkan oleh Mahkamah Persekutuan bahawa doktrin harapan yang sah tidak dan tidak patut menolak kuasa statutori nyata yang diletakhakkan di dalam pihak berkuasa kerajaan. Konsisten dengan sifat prerogatif kuasa tersebut, tiada hak nyata untuk didengar atau diberitahu mengenai alasan pembatalan (lihat perenggan 36).

(3) Pernyataan oleh wakil pemohon bahawa dia telah diberitahu oleh pegawai daerah berkenaan bahawa pembatalan adalah akibat tidak membayar premium adalah kata dengar dan tidak disokong. Pegawai daerah tidak dipanggil untuk menyokong hujahan tersebut dan fakta bahawa responden-responden tidak mempertikaikan atau mencabar hujahan tersebut melalui afidavit tidak mengubah atau meminda sifat pernyataan yang dipohon untuk dimasukkan. Keterangan kata dengar patut ditolak; ia tidak boleh diterima hanya kerana tiada bantah yang dibuat. Adalah tugas mahkamah untuk mengecualikan kesemua keterangan yang tidak relevan atau tidak boleh diterima walaupun tiada bantahan dibuat terhadap kebolehterimaannya (lihat perenggan 37).]

Cases referred to

Anisminic Limited v The Foreign Compensation Commission and Another [1969] 1 All ER 208, HL (refd)

Associated Provincial Picture Houses Limited v Wednesbury Corpn [1948] 1 KB 223, CA (refd)

B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] 1 MLJ 169, PC (refd)

Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin [1997] 2 MLJ 17, CA (distd)

Dr Ti Teow Siew & Ors v Pendaftar Geran-Geran Tanah Negeri Selangor [1982] 1 MLJ 38; [1981] CLJ (Rep) 142 (refd)

Glen Waverley Sdn Bhd v Pengarah Tanah Dan Galian, Negeri Selangor & Anor [2001] 4 MLJ 122; [2001] 8 CLJ 164, HC (distd)

Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & 12 Ors Lesco Development Corporation Sdn Bhd v Yap Chong Lan & 12 Ors [1984] 2 MLJ 123; [1984] 2 CLJ 150, FC (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481, CA (refd)

Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789; [1997] 2 CLJ 11, SC (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1, FC (refd)
Malaysia National Insurance Bhd v Malaya Rubber Development Corp [1986] CLJ (Rep) 185, FC (refd)
Menara PanGlobal Sdn Bhd v Arokianathan a/l Sivapiragasam [2006] 3 MLJ 493, CA (refd)
Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor [1998] 1 MLJ 305, CA (refd)
Minister of Home Affairs, Malaysia v Persatuan Aliran Kesedaran Negara [1990] 1 MLJ 351; [1990] 1 CLJ (Rep) 186, SC (refd)
Minister of Labour, Malaysia v Lie Seng Fatt [1990] 2 MLJ 9, SC (refd)
Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors [2011] 6 MLJ 507, CA (refd)
North East Plantations Sdn Bhd v Pentadbir Tanah Daerah Dungun & Anor [2011] 4 CLJ 729, FC (consd)
North East Plantations Sdn Bhd v Pentadbir Tanah Daerah Dungun & Anor [2011] MLJU 413; [2011] 2 CLJ 392, CA (refd)
Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (distd)
Penang Development Corporation v Teoh Eng Huat & Anor [1992] 1 MLJ 749, HC (consd)
Petroliam Nasional Bhd v Nik Ramli Nik Hassan [2004] 2 MLJ 288; [2003] 4 CLJ 625, FC (refd)
Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600; [2000] 2 AMR 2265, CA (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)
Rohana bte Ariffin v Universiti Sains Malaysia Hashim Hussin Yaacob v Universiti Sains Malaysia [1988] 2 MLJ 609; [1988] 2 CLJ (Rep) 390 (refd)
Sugumar Balakrishnan v Pengarah Imigresen [1988] 3 CLJ 85, CA (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25(2)
Federal Constitution Part II
National Land Code 40, 42, 76, 78(3)
Rules of Court 2012 O 53 r 2(2)
Specific Relief Act 1950 s 44

Jason Tay (Tay Ibrahim & Partners) for the plaintiff.
Ahmad Fuad Othman (State Legal Advisor, Attorney General's Chambers) for the defendant.

Vernon Ong J:

[1] On 19 March 2013, the court dismissed the applicant's application to quash the respondent's decision to revoke the alienation of a piece of land. The grounds of the decision are as follows.

BRIEF ACCOUNT OF THE FACTS

[2] On 3 February 1993, the applicant submitted an application for the alienation of state land for mixed development. On 26 July 1995, the Majlis Mesyuarat Kerajaan Negeri Selangor ('MMKN') approved the applicant's application for the alienation of a plot of state land known as Lot A, Kg Melayu Subang Tambahan measuring 70 acres for mixed development.

[3] Subsequent thereto, the applicant appealed to MMKN for the express condition of a portion of the land from 'industrial' to 'shop office and commercial complex'. By a letter dated 5 August 1996, the appeal was allowed.

[4] By a letter dated 29 April 2005, the land administrator informed the applicant that Form 5A will only be issued after the pre-computation plans has been submitted and approved by the Selangor Town and Country Planning Department.

[5] On 17 January 2006, the applicant appealed to the land administrator to fix the premium at RM22 per square meter and to change the express condition of the land as 'commercial'. On 21 August 2006, the appeal was rejected by the land administrator.

[6] Subsequently, the applicant appeal's to the land administrator for the express condition of the land to be changed from 'mixed development' to 'commercial' was allowed on 15 November 2007.

[7] On 29 May 2008, the applicant submitted the pre-computation plans to the Pejabat Daerah Petaling. On 29 July 2008, the applicant also submitted the pre-computation plans to the Majlis Bandaraya Shah Alam ('MBSA').

[8] By a letter dated 27 June 2012, the Pejabat Daerah Petaling ('PDTP') informed the applicant that the approval for alienation of the land to the applicant had been revoked by MMKN on 23 May 2012 ('the impugned

decision').

THE APPLICANT'S CASE

[9] The challenge against the impugned decision to revoke the approval for the alienation of the land is premised on the following grounds:

(a) the respondent have acted illegally, irrationally, unreasonably, in excess of jurisdiction, took it account irrelevant considerations and/or failed to take into account relevant considerations when making the decision; and

(b) the reason for the revocation is absurd and devoid of logic.

[10] In brief, the main grounds in support of the application for judicial review are as follows:

(a) the state authority has approved the alienation of the land vide the letter dated 29 April 2005;

(b) the requisite Form 5A would be issued after the pre-computation plans have been approved;

(c) the pre-computation plans were submitted to PDTP and MBSA as evidenced by letters dated 29 May 2008 and 29 July 2008;

(d) the relevant authorities did not do anything to approve the pre-computation plans despite various reminders by the applicant;

(e) on 27 June 2012, the decision to revoke the approval was conveyed to the applicant and no reasons was given for the revocation;

(f) in a telephone conversation between the authorised representative of the applicant one Anthony Michael and Dato' Zulkepli bin Ahmad, the District Officer of the District of Petaling, the said Anthony Michael was informed that the revocation was due to the failure of the applicant to pay the premium; and

(g) the respondents, in revoking the approval for alienation have acted illegally, irrationally, unreasonably, in excess of jurisdiction, took into account irrelevant considerations when making the decision to revoke the alienation of the land to the applicant.

JUDICIAL REVIEW IN MALAYSIA

[11] Judicial review is a branch of law dealing with administrative law. In its traditional sense, it refers to the exercise of the court's supervisory powers over the decisions of inferior tribunals and statutory bodies. The decisions are tested

against established principles developed over time by the common law (see recent decision of the Court of Appeal in *Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors* [2011] 6 MLJ 507).

[12] The powers of the High Court of judicial review is enshrined under the Specific Relief Act 1950 and the Courts of Judicature Act 1964 ('CJA 1964'); in particular the additional powers which are set out in para 1 of the Schedule to s 25(2) of the CJA 1964. It empowers the High Court to issue to any person of authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution. In fact, an application for judicial review may include a prayer for a declaration (O 53 r 2(2) of the ROC 2012). In the context of an application for judicial review of a decision of an inferior tribunal or statutory body, the court is usually called upon to make an order for mandamus, prohibition or certiorari. An order of certiorari has the effect of quashing a decision of a judicial or quasi-judicial authority with the intention of restraining any ultra vires exercise of powers. An order of mandamus is directed to private or municipal corporations, or to any of its officers, commanding the performance of a particular act or duty mandated by law (see s 44 of the Specific Relief Act 1950). An order of prohibition is directed only against a judicial or quasi-judicial authority in respect of proceedings before them.

DISTINCTION BETWEEN PUBLIC LAW PROCEEDINGS AND PRIVATE LAW PROCEEDINGS

[13] Underlying the distinct nature of an application for judicial review is the requirement in Malaysian common law to have regard to the interest of good administration. In order to appreciate this concept, it is essential to draw a distinction between public law proceedings and private law proceedings.

[14] In private law proceedings, it is the parties alone who are directly concerned with the outcome of the litigation. The public at large are not usually interested in the outcome. Be that as it may, the public as a whole are concerned only that private law proceedings should provide a fair and efficient manner of resolving disputes between individuals and of enforcing the rights of one individual over another.

[15] In contrast, public law proceedings usually affect many members of the public or even the public at large as well as the parties to the proceedings (eg, decisions of public bodies concerning orang asli native land rights, environment issues, planning permission, public nuisance, etc). Other members of the public will be interested to a lesser extent, whether financial or otherwise. However, there are also public law proceedings which do not usually

affect the members of the public. A common example of this involves a person's application to quash the decision of the Industrial Court dismissing his claim for reinstatement on the ground of unlawful dismissal. In these cases, the court will be largely, if not exclusively, concerned with the merits of the application alone. Both sets of proceedings are treated as public law proceedings because the decision is taken by a public body performing a public duty. Typically, the public bodies qua respondents in an application for JR would be the Ministry of Human Resource, Minister of Home Affairs, Registrar of Societies, State Executive Council, Registrar of Land and Mines, BURSA Malaysia, Securities Commission, government departments (such as Immigration, Royal Customs, Royal Malaysian Police), tribunals (such as Housing Tribunal, Consumer Claims Tribunal), statutory bodies (Malaysian Medical Council, Lembaga Akitek Malaysia), Service Commissions, Director General of Inland Revenue and Majlis Agama Islam, to name a few.

[16] As a general rule, the court has to take into account not only the interests of the applicant and the respondent but also the interests of the public as a whole in good administration.

[17] Judicial review is therefore primarily concerned with enforcing public duties on behalf of the public as a whole. In this sense, the court's concern with vindicating the interests of the individual is part of the process of ensuring that public bodies do not act unlawfully and that they do perform their public duties.

PRINCIPLES OF JUDICIAL REVIEW

[18] At the outset it should also be noted that the remedy of judicial review is not concerned with reviewing the merits of the decision in which the application for judicial review is made. Instead, the remedy of judicial review is primarily a review of the decision making process. In performing this role the court is sitting in its supervisory jurisdiction and not in its appellate jurisdiction (*Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor* [1998] 1 MLJ 305). The court will not interfere with the exercise of any power or discretion which has been conferred on an inferior court, administrative tribunal or other public authority. However, the decision of the body may be quashed by an order of certiorari where (a) that body has acted without jurisdiction; or (b) that body has exceeded its jurisdiction; or (c) body has failed to comply with the rules of natural justice in a case where the rules are applicable; or (d) there is an error of law on the face of the record or the decision is unreasonable in the *Wednesbury* sense. In short, whether certiorari will lie to quash the decision which has already been made by that body depends not on the decision itself but on whether the decision was made ultra vires, unfairly or unjustly in the exercise of the discretion. In dealing with this application for

judicial review there are fundamental principles to be applied within regard the principles enunciated by the Court Of Appeal in a case involving a judicial review of an award of the Industrial Court are instructive. In *Menara PanGlobal Sdn Bhd v Arokianathan a/l Sivapiragasam* [2006] 3 MLJ 493 (CA) at p 511 Mohd Ghazali JCA (later FCJ) said:

> From the authorities discussed above, I would think that *in dealing with judicial review a judge should have the following principles, inter alia, in the forefront of his mind:*
>
> (i) *judicial review is not an appeal from a decision but a review of the matter in which the decision was made;*
>
> (ii) *the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable;*
>
> (iii) *the High Court through judicial review, should not introduce technicalities of the court of law* to the Industrial Court; this would certainly be so as s 30(5) of the Act imposes a duty upon the Industrial Court to have regard to substantial merits of the case rather than to technicalities and it also requires the Industrial Court to decide a case in accordance with equity and good conscience;
>
> (iv) the main and only function of the Industrial Court in dealing with a reference under s 20 of the Act is to determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman and if so, whether such grounds constitute just cause or excuse for the dismissal;
>
> (v) *the Industrial Court should not be burdened with the technicalities regarding standard of proof, the rules of evidence and procedure that are applied in the court of law;*
>
> (vi) *the High Court will not interfere with findings of fact by the Industrial Court unless the same are completely unsupported by evidence and further, will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence; weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court.* (Emphasis added.)

[19] Against the backdrop of the Court of Appeal's decision in *Menara PanGlobal Sdn Bhd v Arokianathan a/l Sivapiragasam*, in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1 (FC) the Federal Court held that the distinction between review and appeal no longer holds. The principles to which a reviewing court should scrutinise included the following matters:

(i) the decision making process where the impugned decision is flawed on the ground of procedural impropriety;

(ii) the merits where the decision is grounded on illegality or plain irrationality;

(iii) the findings where the facts do not support the conclusion arrived at by a tribunal; or

(iv) the findings where the findings of the tribunal had been arrived at by taking into consideration irrelevant matters, and had failed to take relevant matters into consideration.

[20] Be that as it may, the power to review a decision on its merits is not absolute. In cases involving public policy, national interest, public safety or national security, it may be inappropriate to go into the merits or otherwise of a decision during a judicial review application (*Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11 (FC); *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625 (FC)).

[21] In the light of the above cited authorities, it is settled law that there are three principal grounds upon which a court may review a decision of an inferior tribunal or statutory body. They are:

(a) procedural impropriety;

(b) illegality; and

(c) irrationality.

Procedural impropriety

[22] This is a classic case of review of the decision-making process. It addresses the decision-making process to test for procedural fairness with reference to the context and applicable statutory provisions. It includes the right to be heard, the rule against bias and the requirement of prior notice of the decision so that the person affected by the decision will be in a position to make representations and to adequately prepare and answer the case against him. There is also a duty of adequate disclosure. Whilst there must be a fair hearing, there is no general right of oral hearing. There is no general right to call witnesses or to cross-examine witnesses. There is also no general right to legal representation. Whilst there is also no general duty to give reasons, such failure to give reasons may give rise to the inference that there are no valid reasons for the decision. Further, there must be a real hearing. The decision maker cannot fetter its discretion by self-created rules of policy. The decision maker must be impartial and free from bias; the test for bias being absence of direct pecuniary interest (*B Surinder Singh Kanda v The Government of the Federation of Malaya*

[1962] 1 MLJ 169; *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289; [1998] 3 CLJ 85 (CA); *Rohana bte Ariffin v Universiti Sains Malaysia Hashim Hussin Yaacob v Universiti Sains Malaysia* [1988] 2 MLJ 609; [1988] 2 CLJ (Rep) 390).

Illegality

[23] This involves a review of the decision-making process, not the merits. This is a typical ground for the control of discretionary power. Classic examples of illegality include 'error of law' and 'excess of jurisdiction', abuse of power and anisminic error. Under this head, the court will consider whether the public body in question had acted within the terms of power granted to it and within the bounds of the statutory purpose (*R Rama Chandran v The Industrial Court of Malaysia* [1997] 1 MLJ 145; *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629). Decisions tainted with illegality may arise if a decision maker makes a decision for an extraneous purpose or improper motive or takes into consideration irrelevant factors and or fails to take into consideration relevant factors. The court must also be satisfied that the decision is not actuated by mala fide. The decision-making process must also not violate the rule against delegation of discretionary power or the rule against deciding on no evidence or making findings of fact with no rational evidential basis; though as a rule there is non-interference with the assessment of evidence, particularly testimonial evidence (*Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9; *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481; *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600; [2000] 2 AMR 2265).

[24] Lack of jurisdiction may arise in circumstances where a tribunal ask itself the wrong question; or take into account matters which it was not directed or required to take into account; or may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account (*Anisminic Limited v The Foreign Compensation Commission and Another* [1969] 1 All ER 208 at pp 213–214).

Irrationality

[25] Under this ground, the issue is not whether the decision-maker strayed outside the purposes defined by the governing statute (the 'illegality' test), nor whether the decision was procedurally unfair (the 'procedural propriety' test). The question to be determined is whether the power under which the decision-maker acts, a power which normally confers a broad discretion has been improperly exercised. Therefore, a review under this ground extends beyond the process and to the substance or merits of the decision.

[26] A decision which falls on this ground is said to have failed the *Wednesbury* unreasonableness' test (see *Associated Provincial Picture Houses Limited v Wednesbury Corpn* [1948] 1 KB 223). This is a decision that is said to be so outrageous in its defiance of logic that no sensible person who had applied his mind to it could have arrived at it. It also involves a consideration of the principle of 'proportionality' *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261; *Kumpulan Perangsang Selangor v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11). It may also include decisions taken in bad faith, oppressively or based on considerations which have been accorded manifestly inappropriate weight, in addition to strictly irrational decisions which are illogical or arbitrary (*R Rama Chandran*).

[27] The Federal Court adopted this principle in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 (FC). In that case the registered owner of a piece of freehold land (title in perpetuity) applied to the federal government for sub-division of the land and for conversion of the express condition relating to the use of a hotel for which planning permission had been granted. The registered owner was informed that the application would be approved on condition that after surrendering the land, the registered owner would receive back a lease of 99 years instead of title to the land in perpetuity. The registered owner applied to court for an order that the approving authority approve its application for subdivision upon the usual terms and conditions. The High Court gave judgment for the registered owner. On appeal the Federal Court held that the approving authority had no power to make the registered owner/applicant give up its freehold title and receive in exchange a 99 year lease. The condition was set aside. The condition in question which the registered owner objected to did not relate to the permitted development, it was unreasonable and was used for an ulterior object, the object being to bring developed land into line with newly alienated land as to which only leases not titles in perpetuity are granted. At p 146 Suffian LP reiterated the following principles:

> I am of the opinion that English cases afford principles that may be followed here. What are the principles? They are:
>
> 1 The approving authority does not have an uncontrolled discretion to impose whatever condition it likes.
>
> 2 The conditions, to be valid, must fairly and reasonably relate to the permitted development.
>
> 3 The approving authority must act reasonably and planning conditions must be reasonable.
>
> 4 The approving authority is not at liberty to use its power for an ulterior object, however, desirable that object may seem to it in the public interest.
>
> …

> In reconsidering these applications, the Committee should act fairly and not arbitrarily. There must be no bad faith and no dishonesty, though in fairness to everybody concerned nobody has suggested that on the part of the Committee. There must be no unreasonableness, no attention to extraneous circumstances, no disregard to public policy, and things of that sort — things mentioned by Lord Greene MR, at p 682 in *Associated Provincial Picture House v Wednesbury Corporation*.

At p 148, Raja Azlan Shah Ag CJ (Malaya) (as HRH then was) said:

> … On principle and authority, the discretionary power to impose such conditions 'as they think fit' is not an uncontrolled discretion to impose whatever conditions they like. In exercising their discretion, the planning authorities must, to paraphrase the words of Lord Greene MR in *Associated Provincial Picture House v Wednesbury Corporation* have regard to all relevant considerations and disregard all improper considerations, they must produce a result which does not offend against common sense: or to repeat Lord Denning MR's words in *Pyx Granite Co, Ltd v Ministry of Housing and Local Government*, approved in *Fawcett Properties Ltd v Buckingham County Council* the conditions to be valid must fairly and reasonably relate to the permitted development. The dictum of Lord Dening MR has been frequently quoted and followed in these matters. See *R v Hillingdon Council, Ex parte Royco Homes Limited*. Lord Denning said (p 572):
>
> > The principles to be applied are not, I think in doubt. Although the planning authorities are given very wide powers to impose 'such conditions as they think fit'. Nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use these powers for an ulterior object, however desirable that object may seem to them to be in the public interest.
> >
> > …
> >
> > … Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonable. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that 'public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place', (per Dankwerts LJ in *Bradbury v London Borough of Enfield*.)

[28] The law on the doctrine of ultra vires is quite settled. In *Penang*

Development Corporation v Teoh Eng Huat & Anor [1992] 1 MLJ 749, Edgar Joseph Jr J enunciated the law in relation to ultra vires. The following passage bears reproduction:

At pp 754–755:

> I recognise that statutory corporations are subject to the doctrine of ultra vires. They are mere creatures of the statutes creating them, and the law will not suppose that they were created b any purpose other than those which induced the legislature to act (see *Harts's Introduction to the Law of Local Government and Administration* (8th Ed), at pp 292–293).
>
> The doctrine of ultra vires as applied to statutory corporations has been well put by Lord Watson in *Baroness Wenlock & Ors v River Dee Company* thuswise at p 362:
>
> > Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view of carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions.
>
> Unlike a natural person who can in general do whatever he pleases so long as what he does is not forbidden by law or contrary to law, a statutory corporation can do only those things which it is authorised to do by statute, directly or by implication. If such a corporation acts otherwise than in this way its acts are ultra vires. There must in all cases be statutory authority for what is done, and that authority must either by expressly given or reasonably inferred from the language of an Act of Parliament.
>
> The doctrine, if strictly applied to statutory corporations, would greatly impede their activities and would require empowering legislation to be burdened to an impossible extent by detailed provisions. The courts have therefore held that a corporation may do not only those things for which there is expressed or implied authority, but also whatever is reasonably incidental to the doing of those things. As Lord Selbourne said in *Attorney General v Great Eastern Railway Co* at p 478:
>
> > It appears to me to be important that the doctrine of ultra vires … should be maintained. But I agree … that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction, to be ultra vires.
>
> However, this extension, to include powers fairly incidental to those expressly conferred, does not indirectly enable statutory corporations to evade the doctrine of ultra vires. When the question arises whether a power if fairly incidental to those expressly given by the incorporating statute, thought it must be determined reasonably, the courts will not strain the language of the statute to enable the corporation to engage in activities never contemplated by the legislature. Thus if a

company is incorporated by statute to manufacture railway vehicles, it cannot engage in the construction of railway systems (see *Ashbury Railway Carriage & Iron Co Ltd v Riche*).

In *London County Council v Attorney General*, Lord Halsbury LC referred to *Ashbury Railway Carriage & Iron Co Ltd v Riche* and *Attorney General v Great Eastern Railway* and said: 'I think now it cannot be doubted that those two cases do constitute the law upon the subject'.

On the other hand, the tendency of the modern law is to show that the courts are more liberal in their interpretation of what is fairly incidental than was formerly the case (see *A-G v Crayford Urban District Council* and *Bell Houses Limited v City Wall Properties Ltd*), thus it has been held that the setting up of a department to undertake the provision of all the printing and stationery required by a borough council is fairly incidental to the purposes of a municipal corporation, and so not ultra vires (see *A-G v Smethwick Corp*). So also, the employment of a consultant rating surveyor to advise a rating authority on proposals under the Local Government Act 1948 was not ultra vires (see *Grainger v Liverpool Corp*).

And at p 756:

It follows that in the application of the doctrine of ultra vires there are then three issues: first, whether what is done is specifically authorised by statute; secondly, whether (if there be no specific authority) one can reasonably imply authority from the language of the statute; and thirdly, whether an act for which no such direct or implied authority is found is reasonably incidental to the carrying into effect of a statutory purpose (see *CA Cross Principles of Local Government Law* (4th Ed), pp 8–9).

DECISION

Alienation of state land — applicable law

[29] The relevant provisions of the law relating to the alienation of state land can be found in ss 40, 42 76, and 78 of the NLC; they read as follows:

s 40 Property in State land, minerals and rock material

There is and shall be vested solely in the State Authority the entire property in —

(a) all State land within the territories of the State;

(b) all minerals and rock mineral within or upon any land in the State the rights to which have not been specifically disposed of by the State Authority.

s 42 Powers of disposal

(1) Subject to sub-section (2), the State Authority shall have power under this Act —

(a) to alienate State land in accordance with the provisions of section 76;

A (b) …

(c) …

(d) …

B (2)

s 76 Meaning of alienation

The alienation of State land under this Act shall consist of its disposal by the State Authority —

C (a) for a term not exceeding ninety-nine years;

(aa) in perpetuity —

(i) where the Federal Government requires the State Authority to cause a grant in perpetuity to be made to the Federal Government or to a public authority or where the Federal Government and the Government of the state agree to make a grant in perpetuity to the Federal Government;

D

(ii) where the State Authority is satisfied that the land is to be used for a public purpose; or

E

(iii) where the State Authority is satisfied that there are special circumstances which render it appropriate to do so;

(b) in consideration of the payment of an annual rent;

F (c) in consideration, unless the State Authority otherwise thinks fit to exempt thereform in any particular case, of the payment of a premium;

(d) subject, unless the State Authority otherwise directs pursuant to sub-section (5) of section 52, to a category of land use determined in accordance with sub-sections (2) and (3) of that section; and

G

(e) subject so such conditions and restrictions in interest as may be imposed by the State Authority under, or are applicable thereto by virtue of, any provision of this Act:

Provided that nothing in paragraph (aa) shall enable the State Authority to dispose

H of any part of the foreshore or sea-bed for a period exceeding ninety-nine years; and paragraph (d) shall not apply to the alienation of land under this Act in pursuance of an approval given by the State Authority before they commencement thereof.

s 78 How alienation is effected

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(1) The alienation of State land under final title shall be effected in accordance with the provisions of Chapter 3.

(2) The alienation of State land under qualified title shall be effected in accordance with the provisions of Chapter 2 of Part Eleven.

(3) The alienation of State land shall take effect upon the registration of a register document of title thereto pursuant to the provisions referred to in sub-section (1) or (2), as the case may be; and, notwithstanding that its alienation has been approved by the State Authority, the land shall remain State land until that time.

[30] In this application for judicial review, the decision impugned is the MMKN's decision on 23 May 2012 and confirmed on 30 May 2012 which was communicated to the applicant vide letter from the PTDP dated 27 June 2012 to revoke the alienation of the land.

[31] According to the NLC, the prerogative power over state land within the territories of the state, including the power of alienation is vested solely in the state authority (s 40). The power to alienate state land is subject to the conditions relating to the tenure of the land to be alienated; whether a term in perpetuity (freehold) or for a term not exceeding 99 years (leasehold). The other conditions relate to the amount of premium payable, annual rent, category of land use, and such other conditions or restrictions as may be imposed (ss 42 and 76).

[32] It is provided that the alienation of state land is only complete upon the registration under a register document of title. Further, until such registration is effected, the land approved for alienation remains state land (s 78(3)).

[33] In this instance, the land has been approved for alienation but the alienation of the land has not been completed. This is due to the fact that the registration pursuant to s 78(3) has not been effected; no document of title to the land has been issued to the applicant. Therefore, notwithstanding the fact that the land has been approved for alienation, the land remains state land. The state authority's power to revoke the alienation has been recognised by our courts (see *North East Plantations Sdn Bhd v Pentadbir Tanah Daerah Dungun & Anor* [2011] MLJU 413; [2011] 2 CLJ 392 (CA); [2011] 4 CLJ 729 (FC); *Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & 12 Ors Lesco Development v Yap Chong Lan & 12 Ors* [1984] 2 MLJ 123; [1984] 2 CLJ 150; *Dr Ti Teow Siew & Ors v Pendaftar Geran-Geran Tanah Negeri Selangor* [1982] 1 MLJ 38; [1981] CLJ (Rep) 142). In the circumstances, the revocation of the alienation of the land was an act which fell within the exercise of the state authority's powers.

[34] Learned counsel for the applicant also referred to *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1, *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, and *Datuk Bandar Kuala*

Lumpur v Zain Azahari bin Zainal Abidin [1997] 2 MLJ 17. These cases are distinguishable as they relate to planning law, power of the authority to impose conditions; and not to the power of a state authority on alienation.

[35] Similarly, the facts in *Glen Waverley Sdn Bhd v Pengarah Tanah Dan Galian, Negeri Selangor & Anor* [2001] 4 MLJ 122; [2001] 8 CLJ 164 are also distinguishable. The court found that the land in question was no longer state land as applicant had paid the relevant dues and the issue document of title was given to the applicant to whom the land had been alienated. In that case, the state authority was bound by a joint venture agreement entered into between the applicant and the Selangor State Government for the development of a piece of land in the state. Subsequently, the applicant surrendered the issue document of title to the first respondent (state authority) for the purposes of re-alienation of the land to the applicant in accordance with the approved layout plan and issue individual titles in respect of the sub-divided lots. The first respondent refused to deliver separate issue documents of title in respect of two sub-divided lots for a school and a clinic and community hall respectively. The primary issues that arose were (a) whether, in denying title to the applicant, the first respondent had acted ultra vires and in breach of the doctrine of legitimate expectation; (b) whether the school portion was unlawfully alienated to the second respondent; and (c) whether mandamus was available to the applicant and ought to issue. The purported alienation of the portion of the land to the second respondent was an error of law and a nullity and void. The first respondent was under an obligation to issue individual titles to all the approved subdivided lots to the applicant. Mandamus was accordingly issued.

[36] The applicant's case is also based on the doctrine of legitimate expectation. However, this argument is untenable as it has been pronounced by the Court of Appeal and affirmed by the Federal Court that the doctrine of legitimate expectation cannot and should not override the express statutory power vested in the state authority (see Federal Court's decision in *North East Plantations Sdn Bhd v Pentadbir Tanah Daerah Dungun & Anor* at p 747 para [29]). Consistent with the prerogative nature of this power, there is no express right to be heard or to be informed of the grounds of revocation (*Minister of Home Affairs, Malaysia v Persatuan Aliran Kesedaran Negara* [1990] 1 MLJ 351; [1990] 1 CLJ (Rep) 186 (SC)).

[37] In further support of its case, the applicant also relied on the communication between one Anthony Michael and Dato' Zulkepli bin Ahmad, the District Officer of the District of Petaling. In the communication the said Anthony Michael was informed that the revocation was due to non-payment of the premium. The statement by Anthony Michael as to what Dato' Zulkepli said is hearsay and uncorroborated. Dato' Zulkepli was not

called to give evidence to corroborate Anthony Michael's assertion. The fact that the respondents did not file any affidavit to dispute or challenge this assertion does not change or alter the character of the statement sought to be admitted. Hearsay evidence is evidence which ought to have been rejected; it does not become admissible simply because no objection was taken earlier. It is the duty of the court to exclude all irrelevant or inadmissible evidence even if no objection is taken to its admissibility by the parties. (*Malaysia National Insurance Bhd v Malaya Rubber Development Corp* [1986] CLJ (Rep) 185 (FC); Sakar, *The Law of Evidence*, (13th Ed), p 51).

[38] By reason of the foregoing, the court finds that there is no merit in fact or in law to justify the court in quashing the respondent's decision to cancel the alienation of the state land. In the premises, the application is dismissed with costs of RM10,000.

Application dismissed with costs of RM10,000.

Reported by Ashok Kumar